BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TROY A. DAVIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,034,025
J & J MARTIN TRUCKING	)	
Respondent	)	
AND	)	
	)	
KANSAS TRUCKERS RISK MANAGEMENT GROUP	)	
Insurance Carrier	)	

ORDER

Claimant appeals the July 18, 2007 preliminary hearing Order Denying Compensation entered by Administrative Law Judge Pamela J. Fuller. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that claimant had failed to sustain his burden of proving that he was in an employee-employer relationship with respondent at the time of his accident.

Claimant appeared by his attorney, Steven L. Brooks of Liberal, Kansas. Respondent and its insurance carrier appeared by their attorney, Matthew J. Stretz of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the Deposition of Jeff Martin taken on June 18, 2007; the Deposition of Troy A. Davis, taken on June 18, 2007; the transcript of Preliminary Hearing held on July 13, 2007, with attachments; and the documents filed of record in this matter.

ISSUE

Did claimant prove that he was in an employee-employer relationship with respondent on March 31, 2007, when he suffered serious injuries while helping unload one of respondent's trucks? Respondent contends that the jobs worked by claimant were nothing but "job interviews", with respondent observing claimant's driving abilities in order

to determine whether claimant was proficient enough to be hired as a full-time driver. Claimant contends that he had been on two other "interviews", driving a short run with respondent in a tanker truck and then helping respondent bring a load of cattle back from Santa Theresa, Mexico, a trip which took three days and during which claimant drove one of respondent's trucks by himself, while respondent assisted with another truck.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed.

Claimant filled out an application for a job with Martin Trucking on approximately March 26, 2007. The next day, claimant was contacted by Jeff Martin of J & J Martin Trucking, the respondent in this matter and a separate entity from Martin Trucking. Mr. Martin asked claimant if he wanted to accompany Mr. Martin for a couple of hours unloading a tanker. Claimant agreed and accompanied Mr. Martin to unload the tanker, with claimant actually driving the tanker after it was unloaded. Claimant had prior experience as a truck driver and had a current CDL, but had never driven a tanker before. Claimant acknowledged that this trip was a sort of job interview, with Mr. Martin observing claimant and his ability to drive a truck. After completing the tanker job, claimant was asked by Mr. Martin if claimant wanted to help Mr. Martin drive to Mexico and bring back a load of cattle from Santa Theresa, Mexico. Claimant agreed and they left the next day. On this trip, claimant drove approximately half the time on the way to Mexico and over half the time on the return trip. Mr. Martin did leave claimant to drive the truck alone on part of the trip when Mr. Martin had to help another driver. Additionally, at some point, claimant drove the truck into a tunnel at an incorrect angle and caused the trailer to become wedged in the tunnel. Mr. Martin had to drive the truck out of the tunnel and finished driving the truck from that point on. They returned from Mexico late the night of March 30, 2007.

The next morning, March 31, 2007, Mr. Martin called claimant and asked if he was ready to go to work. Claimant agreed, and they proceeded to National Beef in Liberal, Kansas, where they picked up a load of hot tallow to be transported to Sunbelt Feeders where the tallow was to be unloaded. At Sunbelt Feeders, claimant was instructed to climb onto the tanker and open the top. When he did, hot tallow spewed out of the tanker onto his body, face and arms, burning claimant and causing claimant to jump backward off the tanker. Claimant fell 10 to 15 feet to the ground, fracturing his ankle on one leg and the heel on the other leg. Claimant suffered first degree burns from the tallow, but the burns have healed completely, leaving no scars.

Claimant acknowledges that at no time did Mr. Martin tell him he was hired. Claimant also filled out no paperwork for J & J Martin Trucking, and a specific salary was not discussed. But Mr. Martin did tell claimant he would be paid well for driving. Mr. Martin testified that a driver working for him could make $1,000.00 a week or more, but he

would not begin paying a driver until the driver proved his or her competence. Mr. Martin agreed that claimant knew how to drive. But claimant was not hireable until cleared by Mr. Martin's insurance company. The driving information on claimant was submitted to Rutter/Cline/Associates, Inc., Mr. Martin's insurance company, and a response indicating claimant was okay to drive was faxed to J & J Martin Trucking on March 30, 2007, but Mr. Martin testified that on the date of accident, he had not yet seen the fax.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]
>
> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[1] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2006 Supp. 44-501(a).

[4] K.S.A. 2006 Supp. 44-501(g).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.[6]

The primary test used by courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.[7]

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

1. The existence of a contract to perform a certain piece of work at a fixed price;

2. The independent nature of the worker's business or distinct calling;

3. The employment of assistants and the right to supervise their activities;

4. The worker's obligation to furnish tools, supplies and materials;

5. The worker's right to control the progress of the work;

6. The length of time that the worker is employed;

7. Whether the worker is paid by time or by the job; and

8. Whether the work is part of the regular business of the employer.[8]

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[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[7] *Id*. at 102-103.

[8] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

This Board Member finds this matter a very close call. Was claimant hired to perform work for respondent or was he still in a test period, with his driving ability being assessed by respondent prior to hire? Claimant was initially called about a very short run to deliver tallow. This run, which assessed claimant's ability to drive an empty tanker, was clearly a test run, an evaluation of claimant's ability to drive. This record would not support a determination that claimant was an employee at that time. The trip to Mexico is more troubling. Not only was the trip much longer, claimant was allowed to drive for over half the trip, part of the time driving by himself. This fact speaks more to employment than a test. It would be hard to evaluate someone's driving ability when not even in the truck with that person. The fact respondent left a large truck filled with cattle in claimant's control, without supervision, speaks to a level of trust surpassing any test. Finally, the comment by Mr. Martin on the morning of the accident about whether claimant was ready to go to work is not the comment of a tester, but the comment of one in whose mind the decision is already made. Additionally, a major hurdle, the determination of whether claimant was insurable, had also already been reached by respondent's insurance company. Even though Mr. Martin denied knowledge of that determination, the information was in his possession at the time he made the "are you ready to go to work" statement to claimant. The definite nature of that statement speaks of a decision already made, not one still being questioned.

This Board Member acknowledges there are questions remaining to be answered in this record. But at this stage of these proceedings, it is held that claimant had been hired by respondent for the purposes of driving a truck, and the injuries suffered on March 31, 2007, arose out of and in the course of that employment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The preliminary decision of the ALJ is reversed, and it is held that claimant was an employee of respondent on the date of injury.

[9] K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order Denying Compensation of Administrative Law Judge Pamela J. Fuller dated July 18, 2007, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of October, 2007.

BOARD MEMBER

c: Steven L. Brooks, Attorney for Claimant
Matthew J. Stretz, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge